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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

JORGE LUIS VALDES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Question Presented.

1. Whether the federal courts are empowered to deny a defendant bail pending appeal solely on the basis of a judicial prediction that defendant poses a danger to the community — the alleged danger being a "possibility" that the defendant may continue to engage in the non-violent criminal activity of importing non-narcotic controlled substances during the time between his conviction and the completion of the appellate process; particularly where the defendant, convicted of conspiracy to import non-narcotic controlled substances, has no prior record, has fully complied with all conditions of release while on bail both prior to conviction and between conviction and sentencing, and has not been arrested for, or charged with any additional criminal offenses?*

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*In addition to petitioner Valdes, the following individuals are parties to the appeal pending in the United States Court of Appeals for the Fifth Circuit: Howard "Sonny" Hawkins, Roger E. Beckman, William D. "Bill" McCain, George Rawls, a/k/a Howard Kenith Leigh, Ned Ames and James Patrick Herman. This petition relates, however, only to Valdes.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Jorge Luis Valdes petitions for a writ of certiorari to review the orders of the United States Court of Appeals for the Fifth Circuit entered in this case on May 2, 1980 and June 16, 1980.

Introduction.

Petitioner is being held in preventive detention solely on the basis of a judicial prediction that there is a "possibility" that he might "continue" to traffic in cocaine. Petitioner, a 24 year-old honors college graduate, was convicted of conspiracy to import non-narcotic controlled substances on February 2, 1980. The government concedes that he has "no prior criminal record" (Memorandum Brief In Support of Government's Motion For An Order Denying Jorge Luis Valdes' Motion For Bail Pending Appeal, p. 5) (hereinafter referred to as "Government Memorandum"); it does not claim that he presents any risk of flight; and it does not allege that the issues to be presented on appeal are in any way frivolous. Moreover, there is absolutely no allegation in this case that petitioner has ever engaged in, or is likely to engage in, an act of violence or harm against another person. Nonetheless, the district court, at sentencing on February 22, 1980, revoked his bail and denied bail pending appeal, ordering him preventively detained on the basis of the following prediction: "I think Mr. Valdes if permitted to stay out on bail would pose a danger to the community, the community being the whole United States" (A. 20).

The United States Court of Appeals for the Fifth Circuit affirmed the denial of bail pending appeal, characterizing the district court's opinion as follows:

> [T]he district court based its determination on another prong of the Bail Reform Act, 18 U.S.C. § 3148, on its conclusion that Valdes posed a threat to the community because of the *possibility* that he would continue trafficking in drugs while on bail (A. 4a) (emphasis added).

The government has acknowledged, as it must, that this is a case of pure post-conviction preventive detention: "In the case at bar, the district court's denial of bail pending appeal to the defendant Valdes seems to have been predicated *solely* upon the court's determination that Valdes posed a danger to the community" (Government Memorandum, p. 7) (emphasis added). The government also concedes that the sole claim of danger to the community is the possibility of continued trafficking in cocaine: "This case would seem, therefore, squarely to raise the issue 'whether substantial drug trafficking in itself is a sufficient danger to the community to justify denying bond pending appeal to the defendant found guilty of being a dealer in drugs'" (Government Memorandum, p. 7).

This petition, therefore, presents an important issue of first impression in this Court — an issue that potentially affects thousands of federal criminal defendants*; whether the federal courts are empowered to deny a defendant bail pending appeal solely on the basis of a judicial prediction that there is a "possibility" that the defendant may continue to engage in

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*3457 criminal appeals were pending in the United States Court of Appeals on October 1, 1978 and 4,360 criminal appeals were commenced in the following twelve months. Federal Judicial Workload Statistics for the Twelve Month Period Ending September 30, 1979, p. 21. Many appeals involve multiple defendants.

non-violent criminal activity during the hiatus between his sentencing and the completion of the appellate process.

This question requires determination of a number of issues:

1) In allowing the denial of bail pending appeal on the basis of a judicial prediction of danger, did Congress intend to include non-violent conduct, such as trafficking in cocaine?

2) Did Congress intend to permit denial of bail on the basis of a mere "*possibility*" of such future conduct, rather than on the basis of more certain *probabilities*?

3) What is the appropriate standard to be applied in determining the availability and efficacy of conditions of release as an alternative to incarceration?

4) If Congress intended to permit the denial of bail pending appeal on the basis of the criteria (or lack thereof) and procedures (or lack thereof) employed below, is 18 U.S.C. § 3148 unconstitutional?

This Court has never expressly ruled on the legality of preventive detention — either pretrial or pending appeal — though several individual justices have expressed negative views about it.* Nor has this Court often been presented with petitions for certiorari raising issues concerning bail pending appeal, despite the fact that thousands of federal defendants are involved in this process. The reason for this is obvious: the time period between revocation of bail pending appeal and the completion of the appellate process is generally too brief to permit actin by this Court on a petition for certiorari. In this

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* *Williamson* v. *United States*, 184 F.2d 280, 282-283 (2d Cir. 1950) (Mr. Justice Jackson, sitting as Circuit Justice); *Carbo* v. *United States*, 82 S.Ct. 662, 665 (1962) (Douglas, J., in chambers). See also, *Cross* v. *Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

case, however, the likelihood is that the time period between revocation of bail and the completion of the appellate process will be sufficiently lengthy to permit action on this petition for certiorari. Petitioner has been informed that the transcript of the trial will not be ready until September 15, 1980. Petitioner is making every effort to expedite the appellate process, but it is likely that he will remain confined in preventive detention for more than a year before his appeal can be briefed, argued and decided.* There is ample time for this Court to grant the relief petitioner seeks before this case becomes moot by the completion of the appellate process.**

This petition, therefore, permits this Court to decide an extremely important issue of first impression that is rarely presented in a posture permitting review. We respectfully submit that the Court should take this unique opportunity to give crucially needed guidance to the lower courts on the important issue of bail pending appeal in the context of a judicial prediction of alleged danger to the community of a non-violent nature.

Opinions Below.

The decision of the United States District Court for the Middle District of Georgia denying petitioner release on bail pending appeal was issued orally on February 22, 1980, and is un-

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*This does not include review by this Court, which is also covered by 18 U.S.C. § 3148.

**Petitioner respectfully requests that the Solicitor General's Office not seek any extension of time for the filing of its reply to this petition. If the Solicitor General's response is filed in timely fashion, this Court can act on the petition by the first decision day of the October 1980 term.

reported. A copy of the transcript constituting the court's decision is reproduced in the appendix at A. 1a. The United States Court of Appeals for the Fifth Circuit denied petitioner's Motion for Bail Pending Appeal on May 2, 1980. A copy of that opinion, reported at 617 F.2d 59, is reproduced in the appendix at A. 3a. A motion for reconsideration was denied without opinion on June 16, 1980. A copy of that order is reproduced in the appendix at A. 6a.

Jurisdiction.

Petitioner's Motion for Bail Pending Appeal was denied by the United States Court of Appeals for the Fifth Circuit on May 2, 1980. A Motion for Reconsideration was denied without opinion on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions and Federal Rules Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

18 U.S.C. § 3148 provides, in pertinent part, that:

> A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition

for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

Rule 9 of the Federal Rules of Appellate Procedure provides, in pertinent part:

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes condition of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

(c) Criteria for Release. The decision as to release pending appeal shall be made in accordance with Title 18 U.S.C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

Statement of the Case.

Petitioner was arrested in the Republic of Panama on April 26, 1979 after a quantity of cocaine was discovered in the airplane in which he and three others were traveling. His subsequent expulsion to the United States and indictment, with nineteen others, in the Middle District of Georgia for conspiracy to import marijuana, methaqualone and cocaine* constituted Valdes' first involvement with the criminal justice system. After six and one half months of incarceration petitioner was released on bail and fully and faithfully complied with all conditions of release imposed by the district court, including surrender of his passport, restrictions on his travel, and the requirement of daily telephone contact with a probation officer. Trial began on January 7, 1980; the jury returned a verdict of guilty on February 2, 1980. Petitioner remained on bail until the imposition of sentence on February 22, 1980. Despite his continued compliance with the conditions of his release between conviction and sentencing, bail pending appeal was denied at that time.

In revoking bail and denying bail pending appeal the district court found that "if permitted to stay out on bail [petitioner] would pose a danger to the community, the community being the whole United States" — a determination predicated on the court's belief that Valdes would "have to continue to trade and traffic in drugs" in order to support his "lifestyle."

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*Petitioner has maintained from the outset, that even considering all the evidence in the light most favorable to the government, there was no basis for connecting him with the marijuana and methaqualone conspiracies alleged in the indictment and therefore, that the indictment improperly joined separate and independent conspiracies. Accordingly, he challenged the existence of venue in the Middle District of Georgia by means of pretrial motions, motion for judgment of acquittal, and sought jury instructions on the issue. The propriety of joinder and venue are two of the issues to be raised on appeal.

(A. 7a, 6a). The court based this conclusion on its belief that petitioner's business interests — interests which include presidency of an accounting and tax service business; presidency of a corporation engaged in export and brokerage/consultation activities for foreign investors interested in heavy equipment, real estate, livestock and other field investments; and operation of a cattle ranch — provided an inadequate source of income for his living expenses.

No risk of flight was found; there was no determination that petitioner's appeal was frivolous.* Nor did the court consider whether any conditions of release could obviate the perceived danger to the community.

Petitioner sought review of the district court's denial of bail in the United States Court of Appeals for the Fifth Circuit, filing a motion for bail pending appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. In that motion petitioner presented the court with documentation to refute the district court's conclusion that his lawfully obtained income was insufficient to support his "lifestyle" and to affirmatively demonstrate the adequacy of his legitimate business earnings as a means of support.** Petitioner also presented the court with proposed conditions of release, including the submission of weekly documentation of the source and amount of income from his business interests, verification of his employment and sources of income by the probation department, frequent personal and telephone reports to the probation de-

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*Nor could such a claim be made. Indeed, the government has conceded that the appellate issues are substantial.

**This documentation included affidavits from an attorney and certified public accountant in Washington, D.C., verifying a salary of $6000-7000/month from various corporate enterprises and an affidavit from a certified public accountant in Miami explaining why tax returns from petitioner's business interests relied upon by the district court did not accurately reflect petitioner's income from those corporations.

partment, and authorization to search his home, person and business premises without a warrant. Notwithstanding, there was no discussion, and for all the opinion reveals, no consideration or rejection of those alternatives, as required by the statute.

Nevertheless, after finding that petitioner posed no risk of flight, the court affirmed the district court's "conclusion that Valdes posed a threat to the community because of the *possibility* that he would continue trafficking in drugs while on bail" (A. 4a) (emphasis added). In so holding the court relied on the district court's analysis of petitioner's tax returns and three factors not addressed in the decision below — (1) that Valdes had claimed "132,000 . . . seized at the Miami airport in connection with the conspiracy"; (2) that "one of the enterprises in which Valdes was involved owns an ocean going freighter" and petitioner "frequently travels by commercial and private plane"; and (3) trial testimony of an immunized witness concerning an alleged conversation with Valdes concerning prior cocaine dealings and his ownership of a quantity of marijuana (A. 4a).

Petitioner vigorously contested the accuracy and/or relevance of these facts in a motion for reconsideration.* In that motion he also attempted to alleviate the court's concern with

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* Petitioner provided the court with documentation that the currency seized at Miami had been seized from another individual for failure to make the appropriate customs declaration more than 13 months prior to petitioner's alleged involvement in the conspiracy; criminal charges against the individual had been dismissed; and $100,000 had been ordered returned to petitioner in a separate civil proceeding. The government introduced no evidence — either at trial or in its opposition to petitioner's bail motion — connecting the $132,000 to the conspiracy. Second, given the complete lack of any evidentiary support for any conclusion that petitioner's "frequent" travels were drug related or that the freighter owned by one of his companies was ever involved in any unlawful activities, the existence of the vessel and petitioner's travels were irrelevant. Third, the testimony as to petitioner's conversations

the sources of his income, submitting his prior testimony at various bail hearings as to the nature of his corporations, and affidavits from the comptroller of his corporations describing the nature of his businesses.* Nonetheless, the motion was denied on June 16, 1980.

Reasons Why the Writ Should be Granted.

It is a fundamental presumption of Anglo-American law that no one is required to suffer imprisonment for crime prior to a final determination of the case by a court of last resort. *Cohen* v. *United States*, 82 S.Ct. 526, 528 (1962) (Douglas, J., in chambers); see *Harris* v. *United States*, 404 U.S. 1232 (1971) (Douglas, J., in chambers); *Sellers* v. *United States*, 89 S.Ct. 36 (1968) (Black, J., in chambers); *Leigh* v. *United States*, 82 S.Ct. 994 (1962). Congress delineated certain extremely narrow exceptions to this general principle in the Bail Reform Act of 1966 with respect to the post-conviction availability of bail pending sentencing or appeal. 18 U.S.C. § 3148. These narrowly drawn exceptions allow the denial of bail pending appeal only if: (1) the appeal is deemed frivolous or brought solely

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concerning prior involvement in drug trafficking came from an immunized witness originally arrested with petitioner in Panama, who failed to mention any such conversation either in two detailed statements to law enforcement officers shortly after his arrest or in his grand jury testimony — despite the fact that he was a former law enforcement officer concededly familiar with the need for providing complete statements. Moreover, another immunized government witness, also arrested with petitioner in Panama and present at the time the conversations were alleged to have occurred, testified that he had no recollection of any such conversation.

*The affidavit also outlined the brokerage role petitioner played in his business — a role generating substantial income without requiring a large initial input of capital.

for delay; (2) no one or more conditions of release will reasonably assure that the defendant will not flee; or (3) no one or more conditions of release will reasonably assure that the defendant will not pose a danger to any other person or to the community. *Id.* Thus, the Act embodies "a strong presumption in favor of post-trial as well as pre-trial release . . .." *United States* v. *Provenzano*, 605 F. 2d 85 91 (3rd Cir. 1979).

This Court has provided no definitive standards or criteria to guide lower courts in determining when "danger to the community" justifies the denial of bail pending appeal. 18 U.S.C. § 3148. Nor have the Courts of Appeal provided the necessary guidance on this question. Among the questions which require authoritative answers are the following. What types of predicted future conduct constitute danger to the community? What degree of likelihood that such predicted conduct may occur is required?* What criteria and standards are to be applied in determining whether an individual poses such a danger? What criteria and standards are to be utilized in determining that no conditions of release can prevent that danger? These are all questions potentially affecting thousands of criminal defendants which should be addressed by this Court to insure the uniform, fair, and equitable administration of justice throughout the federal system.

In a case, like the one at bar, where a defendant poses no threat of flight and where the appellate issues are concededly substantial, unguided reliance on "danger to the community" to deny release pending appeal can result in the sanctioning of a system of preventive detention based on the frailties of human behavioral predictions — a system of untested constitutionality and one which was considered and rejected by

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* For example, must the degree of likelihood be higher when the predicted danger does not involve the threat of physical violence?

Congress both prior to the initial passage of the Bail Reform Act and in its subsequent consideration of amendments to the statute.

A loose application of the "dangerousness" exception to the presumption of release on bail is no less onerous at the post-conviction stage than at the pre-trial stage of criminal proceedings. The threat of abuse is inherent in all preventive detention. In the words of Mr. Justice Jackson, sitting as Circuit Justice:

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted. *Williamson* v. *United States*, 184 F.2d 280, 282-283 (2d Cir. 1950).

Indeed, any form of preventive detention is unsound both as a matter of public policy and constitutional law.*

Predictions of any human conduct are problematic. Humans are complex entities, and the world they inhabit is full of unex-

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*Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970); Dershowitz, *Preventive Detention: Social Threat*, 6 Trial, Dec.-Jan. 1969-70 at 22, 24 (1970); see *United States* v. *Bigelow*, 544 F.2d 904, 907-08 (6th Cir. 1976).

Preventive detention, whether pre- or post-trial, necessitates prediction by judges untrained in the complexities of human behavior. As the Third Circuit recently observed: "A finding that one convicted of a crime poses a danger to the community necessitates predictions of future behavior that 'must rest on a "scrupulous inquiry"' into an applicant's past, his prospects if released, and any possible conditions of release that might mitigate the danger he poses." *United States* v. *Provenzano*, 605 F.2d 85, 91 (3rd Cir. 1979).

pected occurrences that cannot be accurately catalogued and predicted either in an actuarial or a clinical manner. Predictions of rare human events are even more difficult to make, and predictions of rare events occurring within a short period of time are the most difficult of all.* Accordingly, predictions of dangerousness pending appeal begin with heavy odds against their accuracy. The predictor is likely to spot a high number of persons who actually present a danger to the community only if he is willing to imprison a vastly larger number of defendants who would not, in fact, present such a danger.** Because of this inherent unreliability, petitioner submits that there must be, at minimum, a strong and clear indication of serious and unpreventable danger to the community based on clear and convincing evidence before bail pending appeal can be denied on the basis of danger to the community.

"Danger to the community" is not defined in the Bail Reform Act. Nor does the legislative history provide a clear indication of Congressional intent to rely on the possible future commission of non-violent offenses as a sufficient basis for overcoming the presumption in favor of bail pending appeal. Given the difficulty of accurately predicting human behavior, and congressional rejection of prevention detention, petitioner submits that the danger to the community necessary to justify the denial of bail pending appeal must be limited to a threat of violence or physical harm. In the absence of a threat of violence, the community is adequately protected by imposing additional punishment for any offenses actually committed by a defendant released on bail. Any potential danger from the possible future commission of non-violent crimes is far out-

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*See, e.g., Monahan, John, The Clinical Prediction of Violent Behavior (1980); Stone, Alan, Mental Health and the Law — A System in Transition (1975).

**See, e.g., Dershowitz, Imprisonment by Judicial Hunch, 57 A.B.A.J. 560, 562 (1971).

weighed by the danger of unjust deprivation of liberty on the basis of an erroneous prediction inherent in an effort to predict future human conduct. Thus, in the absence of clear congressional authorization to confine an individual on the basis of a prediction of future non-violent conduct, canons of judicial construction require the courts to read the statute so as to prohibit that constitutionally questionable construction. See, e.g., *Sellers* v. *United States*, 89 S.Ct. 36 (1968) (Black, J., in chambers) in which Mr. Justice Black, in holding that the record failed to establish danger to the community, noted that defendant's offense had not been a crime of physical violence. See also, *Harris* v. *United States*, 404 U.S. 1232 (1971) (Douglas, J., in chambers) in which Mr. Justice Douglas found conviction of a narcotics offense insufficient justification for a finding of danger to the community.*

The definition of danger to the community is only a threshhold issue. The quantum and nature of proof required before dangerousness may be found, and the procedures to be employed in making that determination are also questions of first impression presented by this petition for a writ of certiorari.

The degree of likelihood and nature of proof required for a finding that a defendant poses a danger to the community is an issue central to the bail process and is one which is not addressed in either 18 U.S.C. § 3148 or Rule 9 of the Federal Rules of Appellate Procedure. The confusion engendered by the interplay of these provisions — a statute which includes a presumption in favor of bail and a rule which incorporates that statute but shifts the burden of establishing dangerousness

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* Petitioner's offense involved no violence. He has no past record of violence; nor is there any indication he will engage in violent activities in the future. Thus, if this Court agrees that danger to the community requires evidence of violence or physical harm, certiorari should be granted, the decision below should be vacated, and bail pending appeal should be granted.

from the government (see, e.g., *Leary* v. *United States*, 431 F.2d 85, 87, 91 (5th Cir. 1970)) to the defendant is, in and of itself, an issue which should be clarified by this Court.

However, regardless of the placement of the burden, the court remains obligated to find a danger to the community before denying bail pending appeal on that basis and the degree of likelihood and nature of proof required for that finding is a question which should be resolved by this Court. At the very least the court should be obligated to conclude that there is "clear and convincing evidence" of future danger before liberty can be denied on that basis. See, e.g., *Addington* v. *Texas*, 441 U.S. 418 (1979).

In this case, the decisions below make it clear that the sole basis for petitioner's incarceration is a judicial finding that Valdes poses a danger to the community because of the "*possibility* that he would continue trafficking in drugs while on bail" (A. 4a) (emphasis added). Thus, the petition squarely presents this Court with the opportunity to determine whether the "possibility" of non-violent criminal activity constitutes a sufficient predicate for a total deprivation of liberty prior to final adjudication of the validity of a conviction; or whether, as petitioner contends, the statutory presumption in favor of release on bail pending appeal and due process of law demand, at minimum, establishment of a more certain *probability* that release on bail would endanger the community before such danger can be found. Petitioner submits that there must be a finding, after consideration of the facts and arguments presented by defendant and the government, that a *probability* — as opposed to a mere possibility — of danger exists. A probability that an individual has committed an offense is necessary to justify the deprivation of liberty occasioned by an arrest; similarly, a probability that a defendant will engage in future criminal activity should be required before the deprivation of liberty engendered by the denial of bail pending appeal

is imposed.* Petitioner further submits that "clear and convincing" evidence should be required to support the finding that there is a probability a defendant will engage in future criminal activity. See, e.g., *Addington* v. *Texas*, 441 U.S. 418 (1979).

Guidance in this area is sorely needed. The standards governing release on bail pending appeal should not vary from court to court according to individual judicial assessments of the degree of likelihood and nature of proof required. Uniformity throughout the federal system is essential to the fair and equitable administration of the bail process and, given the statutory silence, can only be established by this Court.

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*Petitioner submits that if the probability of danger is required, there is clearly no justification for his incarceration. This was petitioner's first offense. There are no outstanding criminal charges against him. Nor is there any evidence that he violated the conditions of his pre-conviction release. Indeed, the government concedes that it has no evidence that he was involved in any criminal activity while released on bail.

The absence of justification for denying bail pending appeal is further highlighted by the fact that the district court continued bail from the time of conviction to the time of sentencing. Post conviction release on bail pending sentencing is governed by the same standards as released on bail pending appeal. Thus, his release from February 2-22, 1980, contains an implicit finding that petitioner posed no danger to the community — a finding predicated on the same information the court subsequently relied on to deny bail pending appeal after sentencing. Based on his actions while released on bail, and the absence of any prior criminal record, petitioner submits that the court could not have found a probability of danger to the community and that he should have been released on bail pending appeal.

Moreover, although anything is "possible" in theory, petitioner submits that his conduct while on bail also vitiates any reasonable "possibility" that he poses a danger to the community, and that in light of the documentation as to the adequacy of his legal sources of income to provide for his living expenses — the affidavits from two certified public accountants and the comptroller of the corporations with which petitioner is involved (see statement of facts, *supra* at 9, 11) — the conclusions by the courts below that he could only support himself through continued drug trafficking are unsupportable and clearly erroneous.

This petition also raises the question of whether the procedure utilized in arriving at bail decisions must be reevaluated. The Court of Appeals is charged with the duty of independently assessing the merits of a bail appeal. See, e.g., *United States* v. *Provenzano*, 605 F.2d at 92, 93. Where, as here, a bail determination hinges on the interpretation of vigorously disputed factual matters, a decision based on papers, affidavits and portions of the record (see Rule 9(b), Federal Rules of Appellate Procedure) may be insufficient: an adversary or even an evidentiary hearing may be necessary to provide the court with a sufficient basis for resolving the dispute. However, Rule 9(b) makes no provision for even a discretionary hearing. Accordingly, petitioner submits that the constitutionality of a procedure that makes no provision for a discretionary hearing, when warranted by the circumstances, should be reevaluated by this Court.*

Finally, this Court must make it clear that a finding of danger to the community is not, alone, sufficient basis for the denial of bail pending appeal. Incarceration is a matter of last resort, to be imposed only upon the additional finding that no conditions of release can reduce the risk of danger to a level of reasonable safety. As Mr. Justice Black wrote in *Sellers* v. *United States*, 89 S.Ct. at 38:

> The idea that it would be "dangerous" in general to allow the [bail] applicant to be at large must — if it is

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*The Court of Appeals relied on trial testimony from an immunized government witness concerning alleged conversations in which petitioner discussed prior involvement in drug trafficking. This testimony was not only undermined by cross-examination, but contradicted by another immunized witness. Where credibility is obviously critical, or where factual matters are seriously contested, the bail procedure should provide the court with a mechanism for making its assessment of the reliability of the evidence after hearing and observing the witnesses themselves.

> ever a justifiable ground for denying bail as distinguished from a separate proceeding for a bond to keep the peace — relate to some kind of danger that so jeopardizes the public that the only way to protect against it would be to keep the applicant in jail.

And as the Third Circuit recently said:

> Given this statutory responsibility to set whatever restrictions on release are necessary to ensure against an applicant's flight or potential danger, bail should be denied under the Bail Reform Act only as a matter of last resort. In particular, the danger to the community posed by the defendant must be of such dimension that only his incarceration can protect against it. *United States* v. *Provenzano, supra* at 94.

Despite this statutorily mandated examination of alternatives to incarceration, the denial of bail in this case was predicated solely on a finding of danger to the community. Neither opinion provides a basis for concluding that conditions of release could not reduce the risk of danger to an acceptable level, or even mentions the possibility of imposing conditions of release as an alternative to incarceration — despite the fact that petitioner specifically offered for consideration a comprehensive and stringent program of supervisory conditions, including weekly submission of documentation of his business income, verification of his employment and sources of income by the probation department, frequent personal and telephone reports to the probation department, and authorization for warrantless searches of his home, person, and business premises.

Moreover, 18 U.S.C. § 3148 fails to set forth any standards to guide the lower courts in their consideration of the availability and efficacy of conditions of release as an alternative to incarceration pending appeal. Whether the court's reason to believe that no conditions of release afford sufficient protection to the community is to be predicated on a preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt is another question of first impression which should be answered by this Court to provide uniform and equitable standards for bail pending appeal throughout the federal judicial system.

Conclusion.

Reliance on danger to the community to deny a defendant bail pending appeal effectively authorizes a system of preventive detention and must, therefore, be strictly circumscribed to safeguard against abuse. However, this Court has not yet provided the necessary standards and criteria to guide the courts in their interpretation and application of 18 U.S.C. § 3148 and Rule 9 of the Federal Rules of Appellate Procedure. This petition presents a paradigmatic example of pure post sentencing preventive detention based on a judicial prediction of the possibility of future non-violent criminal activity, thereby affording this Court an opportunity to resolve a number of issues potentially affecting thousands of criminal defendants and to establish uniform and equitable standards governing bail

pending appeal throughout the federal judicial system. Accordingly, for the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

THE COURT: Well, gentlemen, of course Mr. Valdes' background is known to the Court by virtue of several hearings the Court had before the case was ever tried. His financial records were produced to the Court on the ranch and all these other enterprises. It is further known by virtue of evidence we have heard.

Now as the Court stated in that order on bail it seemed to be the Government's contention that Mr. Valdes' real business was trading and trafficking in drugs. And looking at his financial records, gentlemen, using my common sense not only as a judge but as a former business man and banker and lawyer out in the real world I have never seen the source of all that he professes to be involved in at the age of 23, if the money didn't come out of trading and trafficking in drugs. There is not a shread of evidence ever presented to this court that shows a legitimate source for this man to have made any of the money that he has made. You don't go and buy a cattle ranch, gentlemen, just because you want to buy one. You have got to write a check. You don't trade and traffic in fine animals, you don't raise them, you don't sell them, you don't feed them if you don't have some source of capital. And we all know that. The only conclusion that I have is that Mr. Valdes' lifestyle just like the substantial amount of cash that came to this Court in support of his bond had to come from the enterprise that was the subject of investigation by these twelve people. I do not know of anything which indicates that he would do anything other than continue that same enterprise during a period of time he was permitted to be out on bail while this appeal of right proceeds. My best judgment is that to continue to live in an apartment costing over $1,000 a month for rent and to do everything else he has continued to do in the style he has done it he would have to continue to trade and traffic in drugs

just like the evidence shows he was doing and regardless of what Judge King may have had to say about Mr. Miranda which I have not read on purpose, I was already sitting here reading that same statute on which I guess he based his judgment. That's 18 — 3148 which uses the terminology pose a danger to any other person or community.

I think Mr. Valdes if permitted to stay out on bail would pose a danger to the community, the community being the whole United States. And that is my considered judgment based on everything that's in the pre-sentence report, all the evidence I heard, all that I heard during the time that the question his bail should be considered.

Of course you gentlemen have a right to appeal this Court's judgment. I'm going to write it up so you can appeal it just as promptly as you want to.

So there won't be any misunderstanding if the Fifth Circuit or any other court differs with this Court's judgment that he poses a danger within the meaning of 18 USC 3148, because I think he will continue to deal in drugs, and if the matter were then remanded for bail to be set it would be this Court's best judgment that the minimum bail that would hold this man during the period of appeal would be one million dollars surety.

Those are my two best judgments. I will have the Court Reporter transcribe everything I have said and prepare it so you can appeal.

UNITED STATES of America, Plaintiff-Appellee,

v.

Howard "Sonny" HAWKINS, Roger E. Beckman, William D. "Bill" McCain, George Rawls, a/k/a Howard Kenith Leigh, Ned Ames, Jorge Luis Valdes, James Patrick Herman, Defendants-Appellants.

No. 80-7140.

United States Court of Appeals, Fifth Circuit.

May 2, 1980.

Defendant was convicted in the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, of drug offenses and he appealed. On motion for bail pending appeal, the Court of Appeals held that trial court's finding that risk of continued illegal drug activities justified denial of bail was not improper.

Motion denied.

Bail ⇐49(3)

Evidence that the minimal earnings of defendant attributable to legitimate enterprises did not account for the substantial resources available to him or the life style which he was maintaining and evidence of defendant's prior drug transactions sustained determination that release of defendant on bail pending appeals of his drug convictions would run a risk of continued illegal drug activities, thus justifying denial of bail even though, prior to trial, defendant had met all of the bail requirements and had family ties to this country.

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

BY THE COURT:

Petitioner Valdes was denied release on bail pending appeal after conviction and moves this court to order his release on bail not to exceed $500,000.

Valdes was arrested in Panama and expelled to the United States, where he was jailed in May 1979, and a superseding indictment issued in July 1979 charging him, together with 19 others, with conspiracy to import marijuana, methaqualone and cocaine. The district court set pretrial bail at $2,000,000, Valdes appealed to this court and we denied relief. Thereafter the district court reduced bail to $500,000. Valdes met this requirement and complied with all conditions including surrender of his passport, restrictions on travel to the states of Georgia and Florida, and daily contact with a probation officer. He made all court appearances as required, including appearing for sentencing approximately three weeks after conviction.

Valdes was given a maximum sentence of 15 years imprisonment, $25,000 fine, and 15 years special parole.

Valdes is 24 years old. He is well educated and has a good employment record. He has family ties in this country, including a wife, an ex-wife, and a child. He has filed affidavits attesting to his character.

Factors we have set out tend to indicate that Valdes would not flee the country, *cf. Truong Dinh Hung v. U. S.*, 439 U.S. 1326, 99 S.Ct. 16, 58 L.Ed.2d 33 (1978), but the district court based its determination on another prong of the Bail Reform Act, 18 U.S.C. § 3148, its conclusion that Valdes posed a threat to the community because of the possibility that he would continue trafficking in drugs while on bail. Underlying this conclusion were matters developed in connection with pretrial release, during trial, and at hearing of the motion for release pending appeal. The district judge examined tax returns of Valdes and of corporate enterprises in which Valdes participates with his father. He found they showed minimal earnings on the part of Valdes and that the enterprises did not account for the substantial resources that defendant claims to have. The district court found it had not been shown any legitimate source for funds necessary for Valdes to acquire and maintain a cattle ranch for fine cattle, to live in an apartment with rent of more than $1,000 per month, and to continue (until re-incarcerated) the same high style of life engaged in before his arrest.

The cocaine purchased in the present conspiracy had cost at least $1,300,000. Some $132,000 in case was seized at the Miami airport in connection with the conspiracy, and Valdes claims these funds. One of the enterprises in which Valdes is involved owns an ocean going freighter. He frequently travels by commercial and private plane.

There was testimony at trial that Valdes had engaged in cocaine dealings before the present conspiracy. He told of having "two buyers in San Francisco that always bought his coke" and "he only sold to the same two people." There was other testimony that during the conspiracy, while on a flight by private plane to Colombia to pick up contraband, Valdes spoke of owning 20,000 pounds of marijuana in Colombia that was awaiting transportation to the United States; it was not part of the subject of the present conspiracy, and Valdes unsuccessfully attempted to have it hauled back to the United States on the same plane. With respect to the cocaine involved in this conspiracy, Valdes stated that when it had been delivered to an air field in Georgia he would have it transported to Miami by car and then would take it on a Lear Jet plane to San Francisco.

Under these circumstances, the district court concluded that Valdes had been part of a large and well-financed drug operation and had not produced any substantial evidence indicating that he had severed his connection with it. Rather, the court implied, the risk of continued illegal drug activities was a danger.[1]

The government urges that the single fact that Valdes has engaged in one drug conspiracy, by itself, is sufficient basis for a conclusion that the risk of repetition is a danger to the community that supports denial for bail, relying

1. Valdes has filed with this court an affidavit from an accountant stating that he has examined the books of a corporation that allegedly has paid Valdes a salary of over $6,000 per month, as tending to establish a legal source for Valdes's living expenses, and states his opinion that the corporation can continue that salary pending appeal. We are not informed what business the corporation engages in, and its records were not among those delivered to the district judge for his scrutiny. Valdes has also filed other affidavits attempting to explain why records submitted to the district court did not show greater income in corporations in which Valdes has an interest. These documents do not change our conclusion.

upon *U. S. v. Miranda*, 442 F.Supp. 786 (S.D.Fla.1977), *rev'd on other grounds*, 593 F.2d 590 (5th Cir. 1979). This argument misstates the holding in *Miranda*, and the district judge in the present case did not hold that one swallow makes a summer; rather, he concluded from all the surrounding circumstances that the risk of continued drug activity by Valdes was so high that he is a danger to the community. The record before us does not convince us that we should reach a different conclusion.

The motion for bail pending appeal is DENIED.

In the
United States Court of Appeals
for the Fifth Circuit

No. 80-7140

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
versus
HOWARD "SONNY" HAWKINS, ROGER E. BECKMAN, WILLIAM D. "BILL" McCAIN, GEORGE RAWLS, A/K/A HOWARD KENITH LEIGH, NED AMES, JORGE LUIS VALDES, JAMES PATRICK HERMAN,
DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

Before GODBOLD, REAVLEY AND ANDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Jorge Luis Valdes for reconsideration of the Court's order of May 2, 1980, denying motion for bail pending appeal is DENIED

Dated: July 7, 1980

Supreme Court, U. S.
FILED
OCT 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-76

In the Supreme Court of the United States

OCTOBER TERM, 1979

JORGE LUIS VALDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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JORGE LUIS VALDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court and court of appeals erred in refusing to grant petitioner bail pending appeal on the ground that he posed a danger to the community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is reported at 617 F. 2d 59. The oral opinion of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1980. A motion for reconsideration (Pet. App. 6a) was denied on July 7, 1980. The petition for a writ of certiorari was filed on July 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to import marijuana, methaqualone, and cocaine, in violation of 21 U.S.C. 952, 960 and 963. He was sentenced to 15 years' imprisonment to be followed by a special parole term of 15 years, and fined $25,000.[1] The trial judge denied an application for bail pending appeal (Pet. App. 1a-2a). Petitioner thereupon moved for bail in the court of appeals, which likewise denied the motion (*id.* at 3a-5a).

1. Evidence at trial showed that between May 1978 and May 1979, petitioner and his co-defendants imported and attempted to import into the United States large quantities of controlled substances. During a flight across Central and South American in April 1979, petitioner, a co-conspirator and two pilots were compelled by engine trouble to land in Panama (Trial Tr. 4, 30). Panamanian officials found and seized suitcases containing ap-

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[1]Petitioner would appear to be entitled to have his special parole term vacated. See *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980). He can pursue this relief in the district court pursuant to Rule 35, Fed. R. Crim. P.

proximately 233.2 pounds of 93.4% pure cocaine (Memorandum and Order Setting Bail, July 17, 1979, Exhibit A to Government's Motion for an Order Denying Bail Pending Appeal 1). The government's investigation showed that the drugs had cost more than $1.3 million (*ibid.*). Petitioner had discussed other drug dealings with his co-conspirators. He stated that he had two buyers in San Francisco to whom he had previously sold cocaine (Pet. App. 4a). He also said that he owned 20,000 pounds of marijuana in Colombia that he was planning to import (*ibid.*).

2. After imposition of sentence, the trial court denied petitioner's application for bail pending appeal (Pet. App. 1a-2a). The court noted that evidence of petitioner's background had already been adduced at several earlier bail hearings.[2] These hearings had revealed that petitioner, though only 24 years old, had acquired a controlling interest in, among other things, a company that shipped trucks to South America, another that shipped vegetables to Europe, a Panamanian company that owned a seagoing vessel, a purebred cattle ranch, and an Arabian horse ranch (May 18, 1979, Tr. of Hearing before Judge Aronovitz 37-46). While estimates of petitioner's net worth varied, it was clear that his progressive acquisition of these several properties could

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[2]After a hearing on May 10, 1979, following petitioner's deportation to the United States, a United States Magistrate for the Southern District of Florida initially fixed bail at $2,000,000. Thereafter, upon rehearing on May 18, 1979, he reduced the amount to $500,000. After a third hearing later that day, United States District Judge Aronovitz reinstated bail at $2,000,000. At petitioner's arraignment on July 12, 1979, in the Middle District of Georgia, before the judge who was later to preside over the trial, bail was continued in that amount. The transcripts of the Florida bail hearings were available to the trial judge at the arraignment (July 12, 1979, Tr. 6-7). On November 22, 1979, the trial judge reduced bail to $500,000. Petitioner met this requirement and was released.

not be attributed to his earnings from them. The court concluded that petitioner's wealth came from extensive trafficking in drugs, and that there was nothing "which indicates he would do anything other than continue that same enterprise" if released pending appeal (Pet. App. 1a). The court noted that in order to maintain his enterprises and his high standard of living, which included a $1,000 a month apartment, petitioner "would have to trade and traffic in drugs just like the evidence shows he was doing" (*id.* at 1a-2a). Accordingly, it concluded that petitioner "if permitted to stay out on bail would pose a danger to the community, the community being the whole United States" (*id.* at 2a).

Petitioner then filed a motion for bail pending appeal in the court of appeals. The court reviewed the record below and additional evidence supplied by petitioner (Pet. App. 4a n.1) and upheld the conclusion of the trial judge that "the risk of continued drug activity by [petitioner is] so high that he is a danger to the community" (*id.* at 5a).

ARGUMENT

Petitioner contends (Pet. 11-17) that the circumstances of this case do not justify the denial of bail pending appeal on the ground that petitioner is a "danger to the community" within the meaning of 18 U.S.C. 3148. This contention is without merit.

1. First, petitioner contends (Pet. 14-15) that "danger to the community" may be found only where there is a threat of violence. Therefore, he argues, the district court's findings concerning the likelihood that petitioner would continue to engage in drug trafficking if released on bail do not provide a basis for denial of bail pending appeal. The courts are generally agreed, however, that the statute protects the community against more than just physical harm (see, *e.g.*, *United States* v. *Provenzano*, 605

F. 2d 85, 95 (3d Cir. 1979), and it is well-settled that the sale of narcotics may constitute a danger to the community within the meaning of Section 3148. See *Hansford* v. *United States*, 353 F. 2d 858, 860 (D.C. Cir. 1965); *United States* v. *Wilson*, 257 F. 2d 796, 797 (2d Cir. 1958) (Clark, Circuit Judge), cited with approval in *Carbo* v. *United States*, 82 S. Ct. 662, 666 (1962) (Douglas, Circuit Justice); *United States* v. *Miranda*, 442 F. Supp. 786, 792-795 (S.D. Fla. 1977), rev'd on other grounds, 593 F. 2d 590 (5th Cir. 1979); *United States* v. *Nelson*, 346 F. Supp. 926, 927 (S.D. Fla. 1972), aff'd, 467 F. 2d 944 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973); *United States* v. *Erwing*, 268 F. Supp. 877 (N.D. Cal. 1967). Indeed, petitioner cites no authority holding that participation in a major narcotics conspiracy does not pose a danger to the community for the purposes of evaluating the appropriateness of a convicted defendant's release on bail. This danger is particularly severe where, as here, it is expected that the defendant will engage in narcotics distribution on a large scale.[3]

2. Petitioner also contends (Pet. 15-17) that the circumstances of this case do not demonstrate with adequate certainty the likelihood that petitioner would pose a danger if released on bail. We note that, contrary to petitioner's assertion (Pet. 16), the rulings of the court below did not rest on a mere "possibility" that petitioner would continue to traffic in drugs. The district court explicitly stated that "[m]y best judgment is * * * he would have to continue to trade and traffic in drugs" (Pet. App. 1a). Although the court of appeals did use the word "possibility" in its initial description of the trial court's

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[3]In this case, petitioner was convicted of conspiring to import huge quantities of drugs, including over 233 pounds of cocaine (Indictment, at 5).

decision (*id.* at 4a), its more detailed description of the trial court's holding (*id.* at 5a) was that the "risk of continued drug activity by [petitioner] was so high that he is a danger to the community". It was with this conclusion that the court of appeals expressed its independent agreement. Petitioner therefore was judged in both courts by the very standard for which he contends (Pet. 16), namely, a "high" degree of probability.

There is similarly no merit in petitioner's factual assertion (Pet. 17) that the circumstances of this case provide no justification for his incarceration. The record before the trial court in this case fully supports its finding that there is a substantial probability that petitioner will continue to traffic in drugs if he is released.[4] After a series of hearings, it was established that petitioner maintains an extraordinarily high standard of living, including a $1,000 per month apartment, maintenance of a cattle ranch and frequent travel by private plane (Pet. App. 4a). The court further found that there was "not one shred of evidence even presented to this court that shows a legitimate source" for his money (*id.* at 1a). Although petitioner did assert that he derived income from certain business enterprises, the record supports the court's skepticism of this explanation. For example, petitioner testified that he drew $7,000 per month salary from a corporation that grossed only $80,000-100,000 per year (May 18, 1979 Tr. of Bail Hearing before Judge Aronovitz at 38-39). The courts below thus had strong reason to believe that

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[4]Under Fed. R. App. P. 9(c), after he has been convicted, the burden is on the defendant to demonstrate that his release on bail will not pose a danger to the community.

petitioner would continue to engage in drug trafficking if released.[5]

Moreover, although a reviewing court must make its own independent determination, members of this Court have made clear that "great deference" is to be accorded to the bail decisions of lower courts. See, *e.g.*, *Truong Dinh Hung* v. *United States*, 439 U.S. 1326 (1978) (Brennan, Circuit Judge); *Mecom* v. *United States*, 434 U.S. 1340 (1977) (Powell, Circuit Justice); *Harris* v. *United States*, 404 U.S. 1232 (1971) (Douglas, Circuit Justice). Because the trial court has had face-to-face contact with the defendant, his associates and the witnesses, it is in the best position to judge the effectiveness within its district of possible release conditions. See *United States* v. *Provenzano*, *supra*, 605 F. 2d at 91-92. The trial court's determination here that no conditions of release could prevent petitioner from posing a danger to the community, affirmed by the court of appeals, was correct, and further review is unwarranted. The correctness of the decision of the lower courts evaluating the record in this case is not an appropriate subject for redetermination by this Court.

3. Petitioner's final contention (Pet. 18), that the court of appeals must convene an evidentiary hearing before it may endorse a district court's decision denying bail, is without merit. We are aware of no decision that has required such a hearing. Proceedings for bail in the court

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[5]We note that the trial court's decision in petitioner's case was not based on any blanket conclusion that persons engaged in narcotics trafficking are dangerous, or even that those engaged in this particular scheme should not be released on bail. Although six co-defendants have appealed their conviction, only petitioner is a party to this petition (Pet. I n.*). Four of the other co-defendants were released on bail pending appeal, and one was denied bail because the trial court found that he had no reasonable basis for appeal.

of appeals, pursuant to Rule 9(b), Fed. R. App. P., are quasi-appellate and are determined upon papers presented to the court of appeals and upon the record below.[6] In this case, petitioner had the benefit of several hearings on his suitability for bail, and also submitted additional evidence to the court of appeals (Pet. App. 4a n.1). Clearly, he was deprived of no constitutional right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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OCTOBER 1980

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[6]After conviction, a defendant is no longer clothed in the presumption of innocence and has no absolute right to bail. Rather, "courts are empowered to elect to detain defendants in such cases" under the circumstances and using the procedures specified by Congress. H.R. Rep. No. 1541, 89th Cong., 2d Sess. 15 (1966).

DOJ-1980-10

Supreme Court, U. S.
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No. 80-76.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

JORGE LUIS VALDES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Reply Brief for Petitioner Jorge Valdes.

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No. 80-76.

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UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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Reply Brief for Petitioner Jorge Valdes.

Reply.

The government's Opposition attempts to narrow the question presented to a simple redetermination of facts presented to the courts below, ignoring the basic issues presented by petitioner. This petition raises substantial and unresolved questions concerning the standards and criteria to be used in determining release pending appeal — questions which affect thousands of criminal defendants yearly and which call for sorely needed guidance from this Court to establish proper and uniform standards throughout the federal judicial system.

The need for standards and criteria to assist the lower courts in assessing the use of conditions of release as an alternative to

incarceration pending appeal is one of the central issues raised which the government's Opposition has carefully ignored.

Under 18 U.S.C. § 3148 a finding of danger to the community is only a threshold. Yet the government's Opposition, and the courts below, appear unwilling to cross it to reach the ultimate statutory question: Are there any conditions of release that will obviate a perceived danger to the community? If so, incarceration pending appeal cannot be imposed. However, what criteria and standards should lower courts use in determining whether proposed conditions of release "reasonably assure" that no danger is posed? Must there be a good possibility that the proposed conditions will achieve their goal? a probability? a high probability? a virtual certainty? an absolute certainty? Guidance from this Court in this virtually uncharted area is needed to determine the appropriate standard and promote its uniform application by the lower courts.

This case exemplifies the need for such standards. Although required to state its reasons for refusing release in writing, the District Court in this case did not so much as mention the possibility of conditions of release as an alternative to incarceration, much less state why it believed them to be unavailing. Nor did the Court of Appeals discuss the basis for rejecting the substantially restrictive conditions proferred by petitioner in response to the District Court's expressed concern with his "life style" and the "possibility" of future drug trafficking. Indeed, from its complete silence as to conditions of release, it, like the lower court and the government's Opposition here, appears to have totally ignored this statutory prerequisite. Accordingly, certiorari should be granted to provide necessary guidance to the lower courts in their interpretation and application of this critical element of 18 U.S.C. § 3148.

Petitioner requested that this Court grant certiorari to provide an authoritative answer to the question of what degree of likelihood that predicted future conduct will occur is required to justify the denial of bail pending appeal. The government's response simply begs the question by alleging that petitioner was judged by the standard he suggests is appropriate. Indeed the government offers no suggestion as to what it believes to be the appropriate standard. Petitioner submits that examination of the opinions below demonstrates the error of the government's conclusion.* More importantly, he notes that the issue of the appropriate standard to be applied is one that is uniquely suited for and ripe for resolution by this Court. The denial of bail pending appeal is an increasingly common occurrence. However, a defendant should not be deprived of his liberty prior to final adjudication of the merits of his appeal under vague and amorphous standards shifting from court to court. A definitive answer is necessary and should be provided now.

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* The Court of Appeals analyzed the District Court's opinion, including the statement relied on by the government, as expressing a conclusion that there was a "possibility" of continued drug trafficking.

Finding application of a high degree of probability standard in the Court of Appeals' assessment that the "risk of continued drug activity by Valdes was so high that he is a danger to the community" is similarly unfounded. Did the court consider a "possibility" to constitute a sufficiently high risk? Or did it require a higher showing? Government prescience notwithstanding, petitioner maintains that the standard utilized cannot be determined from the opinions and that this Court should take this opportunity to provide guidance as to the proper standards to be applied in determining the existence of danger to the community.

Finally, in discussing what constitutes danger to the community the government, at page 4 of its Opposition, notes petitioner's failure to supply case support stating that participation in a major narcotics conspiracy does not pose a danger to the community. This absence of authority may well be attributable to the fact that when no danger is found and release pending appeal is granted, district courts do not generally write opinions for publication. However, in counsel's experience, and the experience of other defense attorneys known to counsel, many individuals convicted of participation in a major drug conspiracy have been continued on bail pending appeal following their convictions without the imposition of conditions of release other than continuation of, or a moderate increase in, their pre-trial bond.

Conclusion.

Accordingly, for the reasons set forth above and in the petition for a writ of certiorari, certiorari should be granted.

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